

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

NO. CR. 89-62 WBS GGH

Plaintiff,

ORDER

v.

MICHAEL L. MONTALVO,

Defendant.

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A jury convicted Michael L. Montalvo of engaging in a continuing criminal enterprise ("CCE"), 21 U.S.C. § 848, and the court sentenced him to life imprisonment. Defendant subsequently brought a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The court denied his motion, and the court of appeals affirmed. Defendant then sought relief from that judgment pursuant to Federal Rule of Civil Procedure 60(b), and the court denied his motion, as well as two subsequent motions for reconsideration. Defendant now moves once more for

1 reconsideration of the denial of his Rule 60(b) motion.¹

2 I. Factual and Procedural Background

3 In Richardson v. United States, the Supreme Court held
4 that in order to find a defendant guilty under the CCE statute,
5 the jury "must unanimously agree not only that the defendant
6 committed some 'continuing series of violations[,] but also that
7 the defendant committed each of the individual 'violations'
8 necessary to make up that 'continuing series.'" 526 U.S. 813,
9 815 (1999). Since defendant was convicted before the Court
10 decided Richardson, the jury did not receive the instruction that
11 Richardson now requires. (See United States v. Montalvo, No.
12 89-062, Mag. Judge's Findings & Recs. 36, adopted in full, Docket
13 No. 889 (E.D. Cal. July 11, 2001).)

14 Defendant subsequently brought a motion to vacate, set
15 aside, or correct his sentence pursuant to 28 U.S.C. § 2255.
16 (Id. at 1-2.) This court found that while the failure to
17 instruct the jury pursuant to Richardson was not harmless error,
18 defendant's claim was precluded by the anti-retroactivity
19 principle of Teague v. Lange, 489 U.S. 288 (1989). (See id. at
20 39-40.) Defendant then filed an appeal challenging the court's
21 conclusion that Richardson was not retroactive; the government
22 opposed the appeal, but did not file a cross-appeal addressing
23 the harmless-error issue. (Def.'s Mot. for Relief (Docket No.
24 1050) at 2; see Pl.'s Mot. to Dismiss (Docket No. 1052) at 3-4.)

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26 ¹ Defendant has described the instant motion as a
27 "Request for Judicial Notice of Phelps v. Alameida[,] No[.] 07-
28 15167 (9th Cir. June 25, 2009) that Overrules Order of Denial on
November 17, 2008, and Authorizes This Motion for Relief from
that Order by Fed. R. Civ. P[.] 60(b)(6)."

1 The court of appeals affirmed this court's order, but on
2 different grounds; it found that Richardson applied
3 retroactively, but the failure to give the instruction to the
4 jury was harmless error. United States v. Montalvo, 331 F.3d
5 1052, 1059 (9th Cir. 2003) (per curiam).

6 Defendant subsequently brought a motion for relief from
7 final judgment pursuant to Rule 60(b) of the Federal Rules of
8 Civil Procedure. In that motion, defendant cited Greenlaw v.
9 United States, 128 S. Ct. 2559 (2008), to argue, inter alia, that
10 due to the government's failure to file a cross-appeal, the court
11 of appeals was without jurisdiction to determine whether the
12 Richardson-error was harmless. Therefore, defendant argued, the
13 judgement of the court of appeals was "void" under Rule 60(b)(4).
14 Defendant reiterated the same or substantially similar arguments
15 under Rule 60(b)(5) and (6).

16 In an Order issued on November 17, 2008, this court
17 denied defendant's motion; as to defendant's argument pursuant to
18 Rule 60(b)(4), the court specifically held that it had "no
19 jurisdiction to review orders of the [c]ourt of [a]ppeals" and to
20 adjudge them "void." United States v. Montalvo, No. 97-2015,
21 2008 WL 4937624, at *1 (E.D. Cal. Nov. 17, 2008) (citing In re
22 Sasson, 424 F.3d 864, 876 (9th Cir. 2005); Peterson v. Brooks,
23 No. 07-2442, 2008 WL 4072700, at *4 (E.D. Pa. Aug. 29, 2008)).
24 The court subsequently denied two motions for reconsideration
25 filed by defendant, as well as his request for a certificate of
26 appealability.

27 Presently before the court is defendant's motion for
28 reconsideration of the court's November 17, 2008 Order in light

1 of Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009).

2 II. Discussion

3 In Phelps, the Ninth Circuit clarified the "analytical
4 approach[] to Rule 60(b)(6) motions." Id. at 1134-35.
5 Previously, Ninth Circuit precedent instructed that Rule 60(b)(6)
6 could never provide relief due to subsequent changes in governing
7 law. See Tomlin v. McDaniel, 865 F.2d 209, 210 (9th Cir. 1989)
8 (affirming the denial of a Rule 60(b)(6) motion because "the
9 judgment [at issue] . . . became final before the laws changed").
10 Phelps, however, recognized that this per se rule was
11 inconsistent with the Supreme Court's decision in Gonzalez v.
12 Crosby, 545 U.S. 524 (2005), which "did not hold that denial of
13 the motion was required because it rested on a subsequent change
14 in the law." 569 F.3d at 1132. Instead, the Supreme Court
15 affirmed the denial of a Rule 60(b)(6) motion because it "did not
16 exhibit the 'extraordinary circumstances' required to grant Rule
17 60(b)(6) relief." Id. Because the analyses of Tomlin and
18 Gonzalez were thus "clearly irreconcilable," the Ninth Circuit in
19 Phelps concluded that "Tomlin's per se approach has been
20 overruled" and that a "'case by case inquiry' is required." Id.
21 at 1133-34.

22 Defendant's reliance on Phelps appears to be two-fold.
23 First, defendant appears to contend that Phelps is itself an
24 intervening change in the governing law and, under its own
25 holding, should direct the court to revisit its November 17, 2008
26 Order. In other words, defendant argues that Phelps is an
27 intervening change in the law that governs intervening changes in
28 the governing law. Second, defendant contends that since Phelps

1 implicitly contemplates that district courts can re-open cases
2 that have been previously adjudicated by appellate courts if
3 there is an intervening change in the law, this court's
4 conclusion that it had "no jurisdiction to review orders of the
5 [c]ourt of [a]ppeals" was erroneous. Montalvo, 2008 WL 4937624,
6 at *1.

7 First, while Phelps clearly signals a change in the law
8 of the Ninth Circuit, Tomlin's per se analysis did not factor
9 into this court's November 17, 2008 Order. As that Order
10 recounts, defendant's prior claim under Rule 60(b)(6) simply
11 reiterated his contention that the judgment of the court of
12 appeals was void pursuant to Rule 60(b)(4). See id. at *2.
13 Therefore, while Phelps indeed modifies the application of Rule
14 60(b)(6) in certain respects, this court did not have occasion to
15 apply Rule 60(b)(6) in a manner implicated by Phelps's holding.

16 Nonetheless, the instant motion indicates that the
17 court was not sufficiently indulgent when it considered
18 defendant's previous argument under Rule 60(b)(6). Although
19 defendant did not expressly state that he sought relief under
20 Rule 60(b)(6) due to an intervening change in the law, that
21 argument was reasonably apparent from the tenor of his motion.
22 Furthermore, while the court remains skeptical as to its power to
23 declare a ruling of the court of appeals "void" under Rule
24 60(b)(4) for lack of jurisdiction,² defendant correctly notes
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26 ² Even if this court could declare that a ruling by the
27 Ninth Circuit was void for lack of jurisdiction, Greenlaw does
28 not provide a basis for doing so. In that case, the Supreme
Court expressly declined to determine whether the cross-appeal
rule is jurisdictional in nature. See 128 S. Ct. at 2565

1 that Phelps contemplates that district courts may grant relief
2 from a final judgment under Rule 60(b)(6) where an appellate
3 court's ruling in a case has been subsequently abrogated. See
4 Phelps, 569 F.3d at 1128-29, 1141-42 (reversing the district
5 court for failing to grant the petitioner's Rule 60(b)(6) motion,
6 which would have effectively reversed the Ninth Circuit's
7 previous determination that the petition was untimely).

8 Despite having reconsidered this aspect of the November
9 17, 2008 Order, the court nonetheless concludes that Rule
10 60(b)(6) does not provide defendant the relief he seeks because
11 the intervening authority he cites--Greenlaw v. United States,
12 128 S. Ct. 2559 (2008)--does not change the governing law in his
13 case.

14 In Greenlaw, the district court imposed a sentence on
15 the defendant of 442 months. 128 S. Ct. at 2562-63. The
16 defendant appealed, contending that his sentence should have been
17 no longer than 180 months. Id. Although the government did not
18 file a cross-appeal, the court of appeals increased the
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20 ("Following the approach taken in Neztsosie, we again need not
21 type the rule 'jurisdictional' in order to decide this case.").
22 Accordingly, the governing law in the Ninth Circuit continues to
23 provide that "a protective or cross-appeal is only the 'proper
24 procedure,' not a jurisdictional prerequisite once an initial
25 appeal has been filed." Mendocino Envtl. Ctr. v. Mendocino
26 County, 192 F.3d 1283, 1298 (9th Cir. 1999) (quoting Bryant v.
27 Technical Research Co., 654 F.2d 1337, 1341-42 (9th Cir. 1981));
28 see Snider v. Sherman, No. 03-6605, 2007 WL 1174441, at *17 (E.D.
Cal. Apr. 19, 2007) (Wanger, J.) ("[A] notice of cross-appeal is
a rule of practice that can be waived at the court's discretion,
rather than a jurisdictional requirement." (citing Mendocino
County, 192 F.3d at 1298)); see also Stephanie-Cardona LLC v.
Smith's Food & Drug Ctrs., Inc., 476 F.3d 701, 705 (9th Cir.
2007) ("[A] late notice of cross-appeal is not fatal because the
court's jurisdiction over the cross-appeal derives from the
initial notice of appeal.")).

1 defendant's sentence to 622 months because the district court
2 erroneously imposed a ten-year consecutive sentence instead of a
3 twenty-five year consecutive sentence. Id. at 2563-64. After
4 granting certiorari, the Supreme Court vacated the judgement of
5 the court of appeals under the cross-appeal rule, which instructs
6 that "an appellate court may not alter a judgment to benefit a
7 nonappealing party." Id. at 2565.

8 Unlike Greenlaw, the court of appeals in this case did
9 not "alter" this court's judgment "to the benefit" of the
10 government. In Greenlaw, the judgment of the court of appeals
11 effectively increased the defendant's sentence and therefore
12 increased the benefit redounding to the government; here,
13 however, the judgment of the court of appeals provided the
14 government with the identical benefit it received from the
15 judgment of this court, namely, the denial of defendant's
16 petition for habeas corpus. As the Ninth Circuit has explained:

17 So long as the appellee does not seek to "enlarge" the
18 rights it obtained under the district court judgment, or
19 to "lessen" the rights the appellant obtained under that
judgment, appellee need not cross-appeal in order to
present arguments supporting the judgment.

20 Thus, if the district court enters a judgment that
denies all relief to a plaintiff, and the plaintiff
21 appeals from that judgment, a defendant-appellee seeking
to uphold the judgment need not cross-appeal and may urge
affirmance on any ground appearing in the record. If the
court of appeals agrees with the plaintiff-appellant and
22 alters the judgment in some way, it provides relief that
was not provided by the district court, and thereby
"enlarges" the rights of the plaintiff-appellant and
"lessens" the rights of the defendant-appellee. But if
the court of appeals agrees with the defendant-appellee
23 and sustains the judgment, it only affirms what the
district court did. Even if it affirms on the
24 alternative ground, its decision leaves the parties where
the district court left them. In that event, the court
of appeals does not "enlarge" the rights of the
defendant-appellee or "lessen" the rights of the
plaintiff-appellant.

1 Francisco Jose Rivero v. City & County of San Francisco, 316 F.3d
2 857, 862 (9th Cir. 2002) (citations omitted). In light of this
3 explication of the cross-appeal rule, it is plain that the court
4 of appeals was not precluded from affirming this court's denial
5 of defendant's § 2255 motion on alternative grounds.

6 Accordingly, although the Ninth Circuit's recent
7 decision in Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009),
8 has led the court to question part of the analysis in its
9 November 17, 2008 Order, the court will nonetheless deny
10 defendant's motion for reconsideration because Greenlaw v. United
11 States, 128 S. Ct. 2559 (2008), does not present an intervening
12 change in the law governing defendant's case.

13 IT IS THEREFORE ORDERED that defendant's motion for
14 reconsideration be, and the same hereby is, DENIED.

15 DATED: August 20, 2009

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17 WILLIAM B. SHUBB

18 UNITED STATES DISTRICT JUDGE

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